FILED
FEB 24 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.

No. 574

WESTINGHOUSE RADIO STATIONS, INC., TRIANGLE PUBLICATIONS, INC. and WCAU, INC.,
Petitioners and Appellees Below.

v.

DAVID H. H. FELIX,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALLEN S. OLMSTED, 2ND,
WALTER BIDDLE SAUL,
2301 Packard Building,
Philadelphia 2, Pa.,
Attorneys for Westinghouse Radio Stations, Inc.

AARON M. FINE,
HAROLD E. KOHN,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa.,
Attorneys for Triangle Publications, Inc.

GEORGE M. KEVLIN,
ROBERT F. IRWIN, JR.,
2318 Packard Building,
Philadelphia, Pa.,
Attorneys for WCAU, Inc.,

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Summary Statement of Matter Involved	1
Jurisdictional Statement	2
Question Presented	3
Reasons Relied On for Allowance of the Writ ...	3
Prayer for Writ	4
Brief in Support of Writ	7

TABLE OF CASES CITED.

	Page
Gemsco, Inc. v. Walling, 324 U. S. 244	16
Land v. Dollar, 330 U. S. 731	4, 9
Port Huron Broadcasting Company (WHLS) Docket 6987, 4 Pike & Fischer 1 (1948)	3
U. S. v. General Motors Corporation, 323 U. S. 373	4, 9
Western Union Telegraph Co. v. Lenroot, 323 U. S. 490	16
Wong Yang Sung v. McGrath, 339 U. S. 33	7, 16

MISCELLANEOUS.

	Page
67 Cong. Rec. 12499	10
67 Cong. Rec. 12500	10
67 Cong. Rec. 12502	10, 11, 12, 13
68 Cong. Rec. 2589	13
Fair Labor Standards Act of 1938	15
Federal Communications Act of 1934 (Act of June 19, 1934, c. 652, § 308 et seq., 48 Stat. 1088, 47 USC 308 et seq.):	
Section 308	7
Section 315	2, 3, 7, 9, 15, 16
Section 319	7
Section 327	7
Judicial Code, Section 1254, 28 U.S.C.A. 1254	2

IN THE

Supreme Court of the United States

OCTOBER TERM 1950. No.

WESTINGHOUSE RADIO STATIONS, INC., TRIANGLE PUBLICATIONS, INC. AND WCAU, INC.,
Petitioners and Appellees Below,

v.

DAVID H. H. FELIX,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Westinghouse Radio Stations, Inc., Triangle Publications, Inc. and WCAU, Inc., petition the Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED.

These are three suits (consolidated on appeal), brought in the United States District Court for the Eastern District of Pennsylvania, by Plaintiff David H. H. Felix, a Philadelphia lawyer, against the defendants, who operate three radio stations in Philadelphia, for alleged defamation made in two campaign speeches broadcast over defendants' stations. The speeches were delivered on October 24 and 25, 1949, by William F. Meade, Chairman of the Republican Central Campaign Committee of Philadelphia, who was not

a candidate for office himself but had been authorized by the Republican candidates for the office of City Controller and other offices in the ensuing election to use defendants' broadcasting stations, and speak on behalf of their election.

Defendant radio stations moved for summary judgment on the ground that they were forbidden to censor the speeches by Section 315 of the Federal Communications Act of 1934 and were therefore without fault, and could not be held liable for the alleged defamation. The District Court (Hon. William H. Kirkpatrick, Chief Judge) assuming for the purpose of the argument that the statements were defamatory, held that such censorship was prohibited by the Act and entered judgment for defendants.

The Court of Appeals for the Third Circuit (Maris, McLaughlin and Staley, Circuit Judges; Opinion by Maris) reversed on the ground that Section 315 prohibits censorship only of speeches broadcast by the voices of the candidates themselves and does not prohibit censorship of speeches by any other person, even though made pursuant to authority from and on behalf of the candidate. The case was remanded for further proceedings, and subsequently petitions for rehearing were dismissed.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, 28 USCA 1254. The decree sought to be reviewed was entered December 20, 1950; rehearing therein was denied January 25, 1951.

Section 315 of the Communications Act of 1934 reads as follows:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision

into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." (Act of June 19, 1934, c. 652 § 315, 48 Stat. 1088, 47 USC 315.)

QUESTION PRESENTED.

The case turns on the censorship provision of Section 315 of the Communications Act of 1934, and particularly on the meaning of the word "use" therein;

Does a candidate use a station within the meaning of this Section when he authorizes some one to speak in support of his candidacy? The issue is whether this Section permits radio stations to censor the speeches of persons authorized by candidates to speak in their behalf.

The District Court held that Section 315 does include such broadcasts. The Court of Appeals, basing its opinion on the legislative history of the Statute, decided that it applied only to the voice of candidates.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The question involved here is an important question of federal law which has not been, but should be, settled by this Court.

The issue presented here is at the heart of the democratic process in a modern political campaign, to wit, the degree to which the protagonists in the campaign are subject to censorship by the owners of radio stations. Petitioners urge that the utmost freedom from censorship in political matters is in the public interest, and that is the view taken by Judge Kirkpatrick. It is also the position of the Communications Commission (*Port Huron Broadcasting Company* (WHLS) Docket 6987, 4 Pike & Fischer 1 (1948)).

The censorship clause is part of the provision for equal opportunities to all candidates. The two are of equal breadth of coverage. The question of censorship of political speeches by radio broadcasting companies is therefore intertwined with the rights, duties and prohibitions of radio stations in the matter of equality of charges and of allowance of time to be made to the contestants in the political campaign.

This case is the first decision of a federal court on the point.

The decision of the Court of Appeals should be reviewed even though the judgment is not a final one, because its ruling is fundamental to the further conduct of the case. The reversal of the Court of Appeals and the affirmance of the District Court would end the litigation, as well as settle the points which are of interest to the general public.

It is now more appropriate for review than the final judgment will be, and is, in that respect, analogous to *U. S. v. General Motors Corporation*, 323 U. S. 373, 377 and to *Land v. Dollar*, 330 U. S. 731, 734. At its present stage the case presents, unmixed with other issues, the vital issue of censorship by radio stations of political campaigns. This is an issue of the utmost importance, not merely to the radio broadcasters but to the persons who conduct political campaigns, and above all, to the body politic itself, whose welfare is the ultimate foundation of the right, and of the limitations on the right, of free speech.

PRAYER FOR WRIT.

Wherefore your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the

proceedings of the said United States Court of Appeals in the case at bar, and entitled:

David H. H. Felix, Appellant, v. Westinghouse Radio Stations, Inc., Docket No. 10,206;
David H. H. Felix, Appellant, v. Triangle Publications, Inc., Docket No. 10222.
David H. H. Felix, Appellant, v. WCAU, Inc., Docket No. 10223;

to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the orders herein of the United States Court of Appeals for the Third Circuit may be reversed by this Court and the judgment of the District Court for the Eastern District of Pennsylvania affirmed and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

ALLEN S. OLMSTED, 2ND,
WALTER BIDDLE SAUL,
Attorneys for Westinghouse Radio Stations, Inc.,
GEORGE M. KEVLIN,
ROBERT F. IRWIN, JR.,
Attorneys for WCAU, Inc.,
AARON M. FINE,
HAROLD E. KOHN,
Attorneys for Triangle Publications, Inc.

The sole issue here is the scope of the word "use" in Section 315 of the Communications Act, which governs the use of radio broadcasting facilities in political campaigns. The meaning of the word "use" here, as elsewhere, must depend on its context. In the framework of the use of a radio station, the word normally means employing it to accomplish a desired purpose. Thus, in Section 327 of the Act, the Secretary of the Navy is authorized "to *use* all radio stations and apparatus" (emphasis supplied). Elsewhere the licensee is spoken of as *using* the station (Section 308, b; 308, c; 319, a), and such a licensee (usually, as in this case, a corporation) uses the station, regardless of which announcer is speaking for him. It is normal usage, when a commercial sponsor puts on a show with professional actors, to say the sponsor, not the actors, is using the station.

In deciding whether "use" is employed in Section 315 in this, or in some narrower, sense, the District Court here applied the rule of *Wong Yang Sung v. McGrath*, 339 U. S. 33, 45 that it is the plain duty of the courts "to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns."

Judge Kirkpatrick's decision on this point is:

> "The question is as to the meaning and scope of the word 'use' in Section 315. The plaintiff says that this word, rather than 'speak over' or some equivalent, was adopted in order to cover transcriptions and rebroadcasting as well as direct speech into the microphone. I do not believe that it can be given so narrow a meaning.
>
> "If a candidate for office who authorizes another to make an address in the furtherance of his campaign for office does not thereby 'use' the station within the meaning of the law, the purpose of Section 315 fails.

That Section manifestly was enacted in order to safeguard one of the most important features of the democratic process, namely, the opportunity of the people who are going to vote for candidates to hear a full and free discussion of both sides of the issues which affect their choice. The election of candidates for office is but the machinery by which the will of the people as to programs and policies is registered and made effective, and what or who the candidate may be is often secondary to what he stands for. Congress was determined that radio broadcasting stations should not become instrumentalities controlled by one group or party by which its own political philosophy and that of its candidates could be carried to the people and all opposing views suppressed. If 'use' be given the narrow interpretation for which the plaintiff contends it would be perfectly feasible and legal for a broadcasting station to refuse its facilities to all the candidates, in their own persons, and then allow spokesmen for one side unlimited time, to the total exclusion of all speakers on the other side, thus frustrating the policy underlying the Act and its plain intent."

Thus the District Court ended the litigation by a final judgment which turned on its decision of a question of great national importance. The Court of Appeals implies its agreement with this solution of the problem. "We are quite willing to concede," they say in their opinion, "that there are strong reasons for advocating such a broad construction". But that Court felt constrained to reach a contrary conclusion because of its view of the legislative history of the section.

The case now presents, unmixed with other issues, the vital issue of censorship by radio stations of political speeches. A ruling on this point is thus fundamental to the further conduct of the case, and a review by this Court now is therefore more appropriate than it would be at any

other stage of the litigation. In this respect the present case is analogous to *United States v. General Motors Corporation*, 323 U. S. 373, 377 and to *Land v. Dollar*, 330 U. S. 731, 734. If this Court reaches a conclusion different from the Court of Appeals regarding the legislative history and sustains the District Court, such a decision would settle a nationally important question and at the same time would end the litigation.

Actually there is nothing in the legislative history to indicate that Congress intended the word "use" in a restricted sense. Section 315 of the present Act (1934) is identical with Section 18 of the 1927 Act. The Court of Appeals argues that in 1927 the language of the debate shows that the narrower meaning was intended, and that the 1934 Congress rejected an amendment in which the broader meaning was explicitly stated. An analysis of the legislative history, however, fails to sustain the Court's conclusion in either regard.

As to the 1927 debate, the Court of Appeals has interpreted casual phrases employed to illustrate a point irrelevant here as though they were words of intended limitation or definition of this issue. It assumes that the choice of words by a speaker in one context indicates an intention concerning a point about which he was not speaking. Thus, for example, when Senator Dill says that when a station "allows one candidate *for governor* to broadcast then all the candidates *for governor* must have an equal right" (emphasis added), he is illustrating the concept of equality; he is not excluding candidates *for other offices* from the coverage of the statute. Yet, when Senator Dill, to illustrate the same point, puts the case "if a radio station permits one candidate for public office to *address* the listeners" (emphasis added) the Court of Appeals assumes that he is excluding all other uses of the station by the candidate. Thus, remarks taken out of context, appear to the Court to have a meaning which it is submitted they did not have for either speaker or listener in the Senate. The issue

before the Senate on the day Senator Dill addressed it was this:

The House Bill contained no prohibition of discrimination among candidates or censorship over them. The Senate Bill provided that as to such broadcasts, the station should be deemed a *common carrier*. To this the industry objected (67 Cong. Rec. 12499, 12500). Senator Dill thereupon offered the amendment (quoted in the Court's opinion) from which the words "common carrier" had been deleted. In a debate in Committee of the Whole, Senator Cummins argued that under the amendment the station was still a common carrier, and Senator Dill in reply pointed out the difference. Senator Dill's reply to Senator Cummins is the first of the excerpts quoted by the Court. We quote it, in the context in which it was made:

> "MR. CUMMINS: * * * Whenever we declare that a broadcasting station must accept without discrimination the service that is asked of it, it is made a common carrier. It becomes a common carrier by the very fact that we forbid it to discriminate * * *
>
> "MR. DILL: There is the difference that under the common carrier provision a radio station is compelled to take any kind of broadcasting that anybody wants to offer, which would mean that it would take anybody who came in order of the person presenting himself and would be compelled to broadcast for an hour's time speeches of any kind they wanted to broadcast. This provision simply says that if a radio station permits one candidate for a public office to address the listener it must allow all candidates for that public office to do so, and to that extent there must be no discrimination * * *" (67 Cong. Rec. 12502).

In its context, the significance of Senator Dill's statements is the balancing of the second sentence (his amendment) against the first (the common carrier concept).

Senator Cummins continued to press his point. The Court's second excerpt is from Senator Dill's reply. The statement, in its context, is:

> "MR. CUMMINS: I think there is something in the statement of the Senator from Washington that the broadcasting station is made a common carrier as to all candidates for office.
>
> "MR. DILL: If it permits one candidate—but it need not permit any candidate. In other words, a station may refuse to allow any candidate to broadcast; but if it allows one candidate for governor to broadcast, then all the candidates for governor must have an equal right; but it is not required to allow any candidate to broadcast." (67 Cong. Rec. 12502)

Senator Dill is merely reiterating the two halves of his proposition,—that the station need not enter the field, but if it does it dare not discriminate. The verb "broadcast" does not, in this context, (if, indeed, it does in any context) imply the use of one's own voice.

Senator Dill went on to state that "it seemed unwise to put the broadcasters under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid". Senator Cummins then argued that the practical effect would be "to deny to all candidates the use of the broadcasting station". Senator Dill replied in the language of the Court's third excerpt, which, in its context, is:

> "MR. DILL: I will say to the Senator that at present they are not required to allow anybody to speak over the radio. Under the House bill they can allow one man to speak and forbid everybody else to speak. I felt that was not the proper thing. If a station permitted a candidate for Congress to broadcast, then other candidates for Congress should have an equal right." (67 Cong. Rec. 12502)

Senator Cummins then expressed himself as still favoring the common carrier provision. His language clearly shows that he was not distinguishing between political candidates and their supporters. We quote, adding emphasis

> "MR. CUMMINS: My own view of it is that this must become a common carrier service. I think that all the rules we apply to common carriers must finally apply to this particular agency. I am not going to develop that thought, because it would delay the consideration of the bill; but it is obvious to me that if we are going to allow it to be *used for political purposes* at all, it will become a common carrier *as to political service*, and the Senator is simply providing a situation in which broadcasting will be denied to *political candidates*.
>
> "MR. DILL: It is now if the broadcasters see fit to deny it. I think it would be better to deny it altogether than to allow the candidate of one party to broadcast and the candidate of the other party not to be able to secure the same right." (67 Cong. Rec. 12502)

It is apparent that both Senators thought they were talking about the same thing when one said "used for political purposes" and the other "candidate of one party to broadcast".

Thereafter Senator Mayfield entered the discussion, from quite a different angle. We quote the Court's fourth excerpt in its context of a reply to Senator Mayfield.

> "MR. MAYFIELD: If the Senator's amendment is adopted and becomes the law and a lecturer desired to deliver a lecture on bolshevism or communism, he would be entitled to do so.
>
> "MR. DILL: He would not.
>
> "MR. MAYFIELD: I disagree with the Senator.
>
> "MR. DILL: The amendment only provides for candidates for political offices. If a candidate wanted to

speak on that subject as to his candidacy, then he could deliver such a speech." (67 Cong. Rec. 12502)

Here the contrast is between candidates and campaigns for political office on the one hand as against lectures on topics of general political interest on the other.

After considerable discussion in which twelve Senators participated, Senator Dill's amendment was agreed to. In none of this discussion does any senator discuss the breadth of the coverage implied in the word "use".

The bill then went to conference. The Conference Committee made a report, also quoted by the Court, which paraphrases this section, as follows:

> "Section 18 was not embodied in the House Bill. It is a modification of one of the sections of the Senate amendment. It provides in substance that if any licensee shall permit a legally qualified candidate for public office to use a broadcasting station the licensee shall afford equal opportunities to all other candidates for the same office to use the station." (68 Cong. Rec. 2589)

Note that the paraphrase follows closely the language of the statute. Unless one assumes what he is trying to prove, viz. that "use" means "speak over", there is nothing in the Conference Report which sheds any light on the question. The phrase "equal opportunities" on the other hand, indicates the broader interpretation adopted by Judge Kirkpatrick, to wit, that Congress intended to preserve an actual equality among candidates, giving each an equal right to use the radio in whatever way he found most useful, whether for his own voice, or that of another.

The 72nd Congress passed an amendment which received a pocket veto, at the end of President Hoover's administration. Apparently the Court cites this fact because of its bearing on the action of the 73rd Congress which enacted the present statute.

Section 315 of the 1934 bill as reported to the Senate, was identical with the bill passed by the preceding Congress. After the words in the 1927 Statute, there was an insert as follows,

> "and if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at any election, or by a government agency, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public question."

It will be seen that the amendment covered (a) unauthorized supporters (b) opponents, and (c) public questions, and (d) that the nondiscrimination clause required an *equal number* of other persons.

This bill passed the Senate but the House struck out the whole bill, and passed a different one which contained no nondiscrimination clause at all. The compromise which came out of the Conference Committee was the retention of the 1927 provision. No explanation was given in either house, in Committee Report or in debate, as to how or why this compromise was reached. It would seem to be a fairly obvious middle ground. The House Conferees pointed out that the Senate provisions "would have modified and extended the present law".

The Court interprets this compromise as "the House of Representatives have definitely rejected the attempt on the part of the Senate to extend those provisions to include supporters and opponents of candidates as well as the candidate's themselves". It would seem to us that what the House of Representatives was rejecting was the far broader proposition of the right of anyone to express

views on every public question (such as the tariff, and "Pittsburgh plus", to cite two examples from the 1927 debate) and the requirement of an *equal number* of speakers on both sides. But both the Court and we are guessing on this point. And even if the House had focused on the point now at issue, the rejection of the enlargement is as consistent with the view that it was not needed, as that it was not wanted.

The debates both in 1927 and in 1934 show that both houses concerned themselves almost exclusively with other, and more controversial features. The point now at issue was not discussed. In short the intent of Congress is not revealed in the legislative history at all.

The legislative history of Section 315 took a course similar to that of the child labor prohibition in the Fair Labor Standards Act of 1938. The bills in Congress varied from those barring all child labor in interstate commerce to those barring none. A compromise was enacted barring some, but not specifically covering telegraph messengers. The Telegraph Companies argued there, as does the Court of Appeals here, that failure to enact the specific prohibition showed a congressional intent not to prohibit that form of child labor. The words of this Court are, with a few changes, quite as applicable to the legislative history of Section 315. Mr. Justice Jackson said:

> "Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply

to this employment, courts may not refuse to enforce them merely because we cannot understand why a simpler and more direct method was not used. But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it."

Western Union Telegraph Co. v. Lenroot, 323 U. S. 490, 501.

Another clause in the Fair Labor Standards Act encountered legislative treatment comparable to the rejection of the Senate version of Section 315. Says Mr. Justice Rutledge in *Gemsco, Inc. v. Walling*, 324 U. S. 244, 265.

"Rejection of an entire bill cannot be taken to be a specific rejection of each and every feature, more especially of those later reintroduced in the final draft. The most tenable conclusion is drawn by Judge Hand, that 'the section, which had apparently died with the Senate plan, was lifted out of that setting, and was put into the compromise bill as it had stood originally.' As he says, 'It would be indeed a far cry to infer from that that all the items which by accretion had made their way into the parentheses were in this way excised from the Administrator's powers. * * *'."

See also *Wong Yang Sung v. McGrath*, 339 U. S. 33.

It is submitted therefore that the Court of Appeals went astray regarding the legislative history of Section 315. By misinterpreting the significance of the rejection of a much broader amendment in 1934 and by taking out of their context the comments of a Senator on the 1927 Statute, the Court of Appeals abandoned the District Court's very sound interpretation of a very important statute. This Court is therefore asked to dispel the cloud of faulty interpretation of Congressional intent, and apply the mandate of its authority to the basic question, namely,

The extent of the censorship powers of radio stations over the political utterances of candidates and their representatives.

Respectfully submitted,

ALLEN S. OLMSTED, 2ND,
WALTER BIDDLE SAUL,
2301 Packard Building,
Philadelphia 2, Pa.,
Attorneys for Westinghouse Radio Stations, Inc.,
AARON M. FINE,
HAROLD E. KOHN,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa.,
Attorneys for Triangle Publications, Inc.
GEORGE M. KEVLIN,
ROBERT F. IRWIN, JR.,
2318 Packard Building,
Philadelphia, Pa.,
Attorneys for WCAU, Inc.,

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Counter-Statement of the Case	2
Reasons for Denying the Petition	4
1. The Decision of the Court of Appeals Was Not a Final One, Its Grounds Were Narrow and a Consideration by This Court Would Not Settle Any Broad or Important Question of Federal Law	4
2. The Interpretation of Section 315 by the Court of Appeals Is Conducive to Freedom of Speech and in the Public's Interest	5
3. On the Point Decided the Decision of the Court of Appeals Was Correct	9
a. Congress Meant to Confine Section 315 to the Broadcasts of Candidates Themselves	9
b. The Regulations of the Federal Communications Commission Support the Interpretation of the Court of Appeals	10
c. The Distinction Between "Candidate" and Speakers On "Behalf of a Candidate" Is Recognized by the Broadcasting Industry and Many State Legislatures	12

INDEX (Continued).

Page

4. The Court of Appeals Could Have Reached Its Decision On Other Grounds 13

a. The Broadcasts Were Not Broadcasts Under Section 315 13

b. Section 315 Does Not Relieve a Broadcasting Station From Liability for Defamation 14

5. There Is No Conflict of Decision 15

CONCLUSION 15

TABLE OF CASES CITED.

	Page
Bay State Beacon, Inc. v. F. C. C., 171 F. 2d 826...	6
Bruce v. Reed, 104 Pa. 408, 49 Am. Rep. 586 (1883)..	8
McIntire v. Wm. Penn Broadcasting Co., (1945 C. C. A. 3rd) 151 F. 2d 597 (cert. den. 327 U. S. 779, 90 L. Ed. 1007, 66 S. C. 530)	6
Summit Hotel v. National Broadcasting Company, 336 Pa. 182, 8 A. 2d 302	5

STATUTES CITED.

	Page
Act of June 19, 1934, C. 652, 49 Stat. 1088 (Federal Communications Act):	
47 U. S. C. 307 (d)	5
47 U. S. C. 309 (a)	6
47 U. S. C. 315 .....2, 4, 5, 6, 7, 9, 10, 12, 13	

MISCELLANEOUS.

	Page
64 Harvard Law Review 727 .....12, 13	
34 Iowa Law Review 12 (1948)	8
Regulations of the Federal Communications Commission:	
Section 3.105 [47 C. F. R. 3.105]	6
Section 3.181 (a) (2) [47 C. F. R. 3.181 (a) (2)]..11, 12	
Section 3.189 (d) [47 C. F. R. 3.189 (d)]	13
Section 3.190 (a) [47 C. F. R. 3.190 (a)]	11
Section 3.190 (2) (d) [47 C. F. R. 3.190 (2) (d)]..	12
Restatement of the Law of Agency, Sections 1 and 3..	8
Restatement of the Law of Agency, Section 247	8

IN THE

Supreme Court of the United States.

October Term, 1950.

No. 574.

WESTINGHOUSE RADIO STATIONS, INC., TRIANGLE PUBLICATIONS, INC. AND WCAU, INC.,
Petitioners,

v.

DAVID H. H. FELIX,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R26a-29a) is reported at 89 F. Supp. 940. The opinion of the Court of Appeals for the Third Circuit (R36-45) is reported at 186 F. (2d) 1 (advance reports).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Did the Court of Appeals err in holding that Section 315 of the Federal Communications Act of 1934 (47 U. S. C. Section 315), which, by its terms, applies only to broadcasts by a "legally qualified candidate for any public office", cannot be stretched by judicial interpretation to apply, as well, to broadcasts by one who is not a candidate for any office?

STATUTE INVOLVED.

Section 315 of the Communications Act of 1934 is set forth in the Petition at pp. 2-3.

COUNTER-STATEMENT OF THE CASE.

On October 24th and 25th, 1949, one William F. Meade, Chairman of the Republican Central Campaign Committee of Philadelphia, made two speeches from petitioner Westinghouse Radio Station, Inc.'s broadcasting station from a written manuscript, submitted to petitioner in advance of the broadcast.

From these broadcasts electrical transcriptions were made which were in turn broadcast over four other stations at later hours on the same dates.

Before the first broadcasts (on October 24th) over petitioners' Triangle Publications, Inc., and WCAU, Inc., stations, respondent called said stations on the telephone and warned them not to repeat the libelous broadcast of petitioner Westinghouse.

Despite this warning the speech was broadcast over both stations and the second speech was broadcast on the following day.

Respondent brought suit for libel against all five radio stations, four of them in the United States District Court for the Eastern District of Pennsylvania.

The three petitioners filed Motions for Summary Judgment and argument was heard on the motion of petitioner Westinghouse. At that time it was agreed that the disposition of the other cases (including the one in which a motion was not filed) should follow that of Westinghouse, *but the only case heard and decided by the District Court was Westinghouse.*

The District Court found that the broadcasts were within Section 315 of the Federal Communications Act of 1934 and although it found the utterances libelous (for the purpose of the argument) it awarded judgment to the petitioner Westinghouse (defendant) on its Motion.

Thereafter two of the other defendants entered judgment by agreement.

Appeals were taken by the respondent in all three cases to the United States Court of Appeals for the Third Circuit.

This court reversed the District Court and remanded the cases for trial on the merits.

Petitioners then applied for certiorari.

REASONS FOR DENYING THE PETITION.

1.

The Decision of the Court of Appeals Was Not a Final One, Its Grounds Were Narrow and a Consideration by This Court Would Not Settle Any Broad or Important Question of Federal Law.

The judgment sought to be reviewed is not final and, because of the narrowness of the ground upon which the Court of Appeals for the Third Circuit based its holding, a decision by this court at this time reversing or upholding the Court of Appeals would not resolve a broad or important question.

Despite the assertions of the petitioners, an examination of the original decision of the District Court and its subsequent reversal discloses that only one question has, at the present stage of proceedings, been decided.

This question, an extremely narrow one, is "Did the Court of Appeals err in holding that Section 315 of the Federal Communications Act of 1934 (47 U. S. C. Section 315), which, by its terms applies only to broadcasts by a 'legally qualified candidate for any public office', cannot be stretched by judicial interpretation to apply, as well, to broadcasts by one who is not a candidate for any office?"

The Court of Appeals, relying upon the clear language of the section and equally clear legislative history held that it does not.

Even if the Court of Appeals' decision on this point is believed to be wrong it still leaves open the further questions of whether the broadcasts complained of qualified, even under a broadened interpretation of Section 315, for inclusion under that section, and whether the section freed the broadcasters from liability for defamation.

The judgment of the District Court was based on "the meaning and scope of the word 'use' in Section 315" [R. 28a]. The court decided that "use" included the broad-

casts of persons authorized by a candidate for public office [R. 28a] and then made the further decision that since the broadcasting station could not censor it was without fault and under the law of Pennsylvania [*Summit Hotel v. National Broadcasting Company*, 336 Pa. 182, 8 A. 2d 302 (1939)] could not be held liable.

The Court of Appeals held that the District Court was in error in its interpretation of Section 315 to include persons authorized by candidates as well as candidates themselves, and reversed. It did not go into the further important matters of whether the broadcasts complained of (assuming an authorized speaker to be in the same position as a candidate himself) were *actually* under Section 315 and whether the fact of the radio stations' inability to censor freed them from liability for defamation.

Thus it is clear that neither a reversal nor an affirmance of the Court of Appeals' decision would settle any broad or vital question of national import. It would not even settle this single case. On this record, this court could reach only one of several points at issue and that affecting only these petitioners and not the entire industry or the public as a whole.

2.

The Interpretation of Section 315 by the Court of Appeals Is Conducive to Freedom of Speech and Is in the Public's Interest.

Petitioners argue that the interpretation of the Court of Appeals is opposed to the public interest [Petition, 3].

Actually, the opposite is the truth.

Likewise there is no ground for the fear expressed by the District Court (R. 29a) that, under the Court of Appeals' interpretation, spokesmen for one side would be given unlimited time to the exclusion of the other.

Surely, the answer to this is that a license to broadcast is for three years only (47 U. S. C. A. 307 (d)) and no

license may be renewed unless the Federal Communications Commission finds that the public interest would be served thereby (47 U. S. C. A. 309 (a)).[1] It is not difficult to imagine the public outcry and consequent disaster that would attend any such attempt at favoritism on the part of a broadcasting station.

The reason for confining the exclusion of the station's right of censorship to speeches by the candidates themselves is one that commends itself to common sense and public policy.

Broadcasting stations have the right to refuse any program which they reasonably believe to be unsatisfactory, unsuitable or contrary to the public interest. Indeed, this right is made a condition of licensing in the case of a station affiliated with a network organization (47 C. F. R. 3.105) and is specifically granted in the case of political speeches by Section 315.

This right is accorded them not just to allow them to protect themselves from the consequences of defamatory publications but to defend their financial investment and property right of good will against the unfavorable reaction of their listeners to objectionable programs.

In the case of political broadcasts, when all the terms of the Congressional command have been complied with and the station's facilities are "used" for that purpose it is evidently in the public interest not to allow censorship by the station of a matter of such vital importance as the free discussion, by candidates, of the issues of the campaign.

Consider, however, the abuse that reasonably could be anticipated to arise from an extension of this prohibition to persons other than the candidate.

We may expect that the candidate himself, seeking election, will not indulge in such wild and unfounded

(1) "The Commission may refuse to review the defendant's license if it has failed to act in the public interest." McIntire v. Wm. Penn Broadcasting Co., 1945, C. C. A. 3d, 151 F. 2d 597, 599 (cert. den. 327 U. S. 779, 90 L. Ed. 1007, 66 S. Ct. 530). See also Bay State Beacon, Inc. v. F. C. C., 171 F. 2d 826.

charges and breaches of public morals and decency as would endanger his own candidacy. However, if he does, retribution falls on his own head.

By this very logic the extension of the privilege of freedom from censorship to someone speaking allegedly on the candidate's behalf is excluded.

This representative of the candidate might be utterly indifferent to his principal's chances of success. He might be someone so unheeding of ordinary decency as to revel in defaming and traducing honest citizens without a vestige of reason and embarrassing and harming them in their social and economic lives.

Let it not be said that these are gaudy imaginings—conjectures—fanciful fears of improbable events. One, at least, of them describes with tolerable accuracy the results of Meade's speeches over the radio which furnish the subject matter of this suit.

Consider how remote becomes the control of the candidate over the speechmaker. In the instant case it is claimed that the candidates authorized Wm. F. Meade and the entire Republican Central Campaign Committee "to campaign for their election and, as part of the campaign to contract for the rental of radio facilities and to use defendant's broadcasting station" (R. 17a).

Note that there is no authorization to any particular person to make the radio speeches—presumably the Campaign Committee could have delegated this task to anyone—how far the three Congressional words have been extended. It is no longer necessary for the candidate to speak himself or to designate his spokesman—he has relinquished this privilege to others—what is to prevent them, in turn, passing it on—and on—and on, so long as the chain of authority may eventually be traced back to the candidate.

Considered from another point of view the necessity of confining the words "use" by the "legally qualified candidate" to the candidate alone is equally as apparent and compelling.

In discussions of liability under Section 315 it is often expressly stated [2] and, when not stated, tacitly assumed that the speaker (candidate) is, of course, liable for his utterances so that redress can always be sought from the "real" culprit.

Since the immunity claimed by the broadcasting station arises solely because of the use of its facilities for political purposes and since it is claimed that the immunity covers not only the utterances of the legally qualified candidate himself but the remarks of anyone authorized to speak on his behalf it is apparent that the defendant is claiming an agency relationship between candidate and speaker and it is obvious that the basic axiom of the Law of Agency would apply, "Qui facit per alium, facit per se."

This would create a disastrous situation.

When a candidate's agent speaks, immunity can cloak the station only on the theory that when the candidate speaks through an agent he himself is speaking. On that theory candidates will become vicariously liable for whatever their agents say and consequent reluctance to speak through agents will hamper rather than foster the public interest in having campaign issues freely discussed.

The authorization by A, a candidate, of B to speak for him, constitutes a principal-agent relationship between them. (Restatement of the Law of Agency, Sections 1 & 3.)

The candidate, therefore, who may be campaigning for the Presidency of the United States would become liable for the utterances of hundreds or thousands of persons who were properly authorized to speak over the radio on behalf of his candidacy. Restatement of the Law of Agency, Section 247, *Bruce v. Reed*, 104 Pa. 408, 49 Am. Rep. 586 (1883).

---

(2) "The actual speaker, of course, is completely liable for the contents of his remarks. Section 315 of the Act does not affect this liability in any manner nor protect the speaker against civil actions for libel and slander or criminal prosecutions arising out of his violation of any federal or state law." Defamation by Radio by R. C. Donnally, 34 Iowa Law Review 12, 36, note 97 (1948).

The immunity arises only because of the claimed agency relationship of candidate and speaker. It follows that the duties of principal and agent apply equally with the privileges. This, it is submitted, is a necessary and logical consequence of extending the exemption of the broadcasting station from its customary liability as a publisher of defamation from the broadcasts of a candidate himself to those of his agents.

Such a result would soon put an end to all campaigning over the air except by the candidate himself. The consequence of the application of the theory that the defendant advances would be the opposite from what is claimed. Instead of freeing political broadcasts it would, in effect, all but abolish them.

This anomalous situation would surely not be in the public's interest nor in the interest of the candidate or the radio stations.

Once this road is taken, there is no ending. The only distinction between this case, involving a broadcasting station and a street corner speaker campaigning on behalf of a mayor or governor is the immunity claimed by the station.

On the theory of agency, implicit in petitioners' argument, every candidate would be liable for the defamatory utterances of every street corner speaker authorized to campaign for him.

Would such a state of affairs be conducive to freedom of speech? Obviously not.

3.

On the Single Point Decided the Decision of the Court of Appeals Was Correct.

a.

Congress Meant to Confine Section 315 to the Broadcasts of Candidates Themselves.

Petitioners have devoted many pages to attempting to wring an opposite meaning out of a full and clear record of Congressional Intent.

Respondent hastens to state that he will not repeat or add to the quotations, or even citations, from the Congressional Record and Committee Reports. Sufficient is set out in the Record and the Petition and Brief in Support of Petition to gather the clear intent of Congress to confine Section 315 to the utterances of candidates alone.

More may be found by pursuing the cited speeches and reports beyond the confines of the portions already quoted. No matter how thoroughly the debates and reports are canvassed, nothing can be found to support the contention of petitioners that Congress meant to include what it expressly struck out—the speeches of persons other than the candidates themselves.

On the contrary, the further lines and pages of the Congressional Record lend added support to the view set out in the Court of Appeals' decision and no amount of tortured reasoning nor fourth dimensional semantics can overcome the evident intent of plain words and clear thought.

The fact remains, Section 315 (with its identical predecessor) has been the law for twenty-four years;—its language restricts it to "qualified candidates for any public office", although attempts have been made, without avail, to broaden it to include other than the candidates themselves;—accordingly it is entirely reasonable to assume that by these words Congress meant what it said. If it did not, the remedy lies with the Congress and not with this Court.

b.

The Regulations of the Federal Communications Commission Support the Interpretation of the Court of Appeals.

In its Regulations the F. C. C. has shown that it understood Section 315 to apply to the utterances of candidates alone.

It defines "legally qualified candidate", in great detail, as follows:

"A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:

"(1) Has qualified for a place on the ballot or

"(2) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be." [47 C. F. R. 3.190 (a).]

If, as petitioners contend, anyone making a broadcast on a political subject is covered by the Act, this detailed definition is unnecessary and futile.

In other regulations the F. C. C. made a clear distinction between the candidate himself and other persons acting for or on his behalf.

For example:

"If a speech is made by a political candidate, the name and political affiliation of such speaker shall be entered (in the station log)." [47 C. F. R. 3.181 (a) (2).]

"Every licensee shall keep and permit public inspection of a complete record of all requests for broadcast time made by *or on behalf*[3] of candidates for public office." [47 C. F. R. 3.190 (2) (d).]

---

(3) Emphasis Supplied.

These excerpts from the Regulations of the F. C. C. show that there is a distinction to be made between "candidates" and others. In accordance with Section 315 the words "political candidate" are used when speaking of a broadcast—but when applying for time is referred to, the words "by or *on behalf of candidates*" are employed.

If it were considered that persons other than candidates might speak under Section 315 the words "on behalf of" would have been used in Section 3.181 (a) (2) as well as in Section 3.190 (2) (d).

Again we have plain words employed in their everyday meaning. No need for textual exegesis or the higher criticism.

c.

The Distinction Between "Candidate" and Speakers on "Behalf of a Candidate" Is Recognized by the Broadcasting Industry and Many State Legislatures.

Perhaps it is only modesty that prevents the petitioners from acknowledging that they are perfectly familiar with the differences between a statute that says "candidate" and one that says "on behalf of any candidate".

Section 2 of a suggested statute on radio defamation, promulgated by the National Association of Broadcasters, provides as follows:

> "In no event, however, shall any . . . station . . . be held liable for any damages for any defamatory statement uttered over the facilities of such station . . . *by or on behalf*[4] of any candidate for public office." [Defamation by Radio, Donald H. Remmers, 64 Harvard Law Review 727, 741.]

Ten states have adopted statutes more or less in accord with the National Association of Broadcasters' suggestion. Those of California, Colorado, Georgia, Louisiana, Maine,

(4) Emphasis Supplied.

Nebraska and Virginia adopt the wording "or on behalf of". The others do not. [Defamation by Radio, Donald H. Remmers, 64 Harvard Law Review 727, 743-744.] There seems to be no confusion in anyone's mind; when it is desired to confine the exemption from liability for defamation to the words of the candidate this is plainly stated, when the exemption is extended to the broadcasts of others this, too, is as plainly stated.

4.

The Court of Appeals Could Have Reached Its Decision on Other Grounds.

---

a.

The Broadcasts Were Not Broadcasts Under Section 315.

It must be borne in mind that there are types of political programs other than broadcasts by legally qualified candidates under Section 315.

The line between a political broadcast and one on some controversial social or economic issue is very fine, indeed.

The discussion of whether a municipality should have a new waterworks is political—even when discussed at a time when there are no candidates within the definition of Section 3.190 of the F. C. C. Regulations. *This is not a broadcast under Section 315 of the Act.*

Likewise, during campaigns there often have been hour long entertainment programs, with music, singing and dramatics, *sponsored* by a political committee on *behalf* of its candidate or by the candidate himself. These would not come under Section 315.

They would fall under the section dealing with sponsored programs. Section 3.189 (d) of the F. C. C. Regulations [47 C. F. R. 3.189 (d)] deals with this situation:

> "In the case of any program, other than a program of advertising commercial products or services, which

is sponsored, paid for or furnished, . . . by a corporation, committee, association or other unincorporated group, the announcement required by this section (before and after the program) shall disclose the name of such corporation, committee, association or other unincorporated group."

This, it is submitted, is the classification under which Meade's speeches fell.

Consider the announcement made before and after his speeches:

> "The following (preceding) time was contracted for by the Republican Central Campaign Committee. Our speaker tonight is (was) William F. Mead, Chairman of the Committee. . . ." [R. 17a, 18a.]

Consider also the fact that the defendant's dealings were entirely with the Republican Committee and that *not a single Republican Candidate's name was mentioned—nor the offices for which any one of them was running—in the entire course of the two speeches.* [Record 3a-13a.]

These speeches were clearly not the use of a broadcasting station by legally qualified candidates for public office! They were simply politically sponsored speeches and differed in no wise from other programs on what are familiarly referred to as "controversial subjects".

b.

Section 315 Does Not Relieve a Broadcasting Station From Liability for Defamation.

Again assuming that Section 315 includes what it implicitly excludes—supporters as well as candidates—it is submitted that a broadcasting station is not relieved of liability for defamation because of its supposed inability to censor.

Respondent has treated this point at length in his Brief for Appellant [R. 18-23] and the Court is respectfully referred to those pages for a consideration of the matter.

5.
There Is No Conflict of Decision.

There has been no conflict among the Courts of Appeals on this question—indeed, this is the first time such a question has reached them. Considering the length of time this statute has been in force and the number and intensity of bitterness of political campaigns all over the United States during that period—*and* the millions upon millions of words broadcast in those campaigns—can it fairly be stated that this is an important issue?

The answer would appear to be that this question has certainly not bothered the broadcasting industry, its clients or the courts, and that what we have here is the interest of the petitioners in avoiding liability for what were clearly libelous utterances. The importance of the question is confined to the interests of the petitioners alone.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

THOMAS D. MCBRIDE,
Counsel for Respondent.

DAVID H. H. FELIX,
Pro Se.